BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Absent abstention, does a district court with jurisdiction have discretion to decline jurisdiction in favor of a concurrent state court proceeding even in exceptional circumstances where the congressional jurisdictional grant does not confer discretion to decline?

2. Does the lack of a federal question and the application of well-settled principles of state law in a diversity action supply exceptional circumstances, the clearest of justifications, for surrender of jurisdiction?

3. Absent abstention and exceptional circumstances, does a district court with jurisdiction have discretion to decline to proceed in deference to a concurrent state action?

* The current list of the parent corporation and corporate subsidiaries and affiliates of the Respondent required by Rule 28.1, Rules of the Supreme Court of the United States, is set forth in the certificate of counsel of record dated March 6, 1985.

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No. 84-1240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. - - - *Petitioner*

v.

ROBERTS & SCHAEFER COMPANY - - *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT COURT

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent supplements the Petitioner's statement as follows:

The record in the state court action is not present here. The Petitioner (Lake) did not see fit to make it part of the record in seeking the stay order. But everyone agrees Lake commenced an action in the state court against Respondent (R&S) and two Kentucky subcontractors for breach of contract. The action was filed November 12, 1982, while R&S was on the ground testing and completing work on the contract.

R&S appraised the situation. It found itself a defendant in a state court in a small mountain county of Eastern Kentucky (22,590 pop.). The county's sole

industry is coal mining with 27% unemployment. It was pitted against one of the major employers in the community [J.A. 86]. As a Chicago-based corporation, R&S sought a federal forum. The subcontractors joined in the state court action were not parties to the contract [J.A. 9-18], and their presence was solely to prevent removal to federal court. R&S removed, but the district court remanded on February 15, 1983.

Lake owed R&S $1,397,615.96 on the contract. R&S felt a strong need for a federal forum. On April 6, 1983, R&S commenced this action in the United States Ditstrict Court for the Eastern District of Kentucky for the amount due under the contract asserting mechanic's and materialman's liens [J.A. 5-22].

Lake moved to dismiss or stay [J.A. 23-40]. R&S responded [J.A. 54-66]. Affidavit of counsel sets forth the comparative status of both cases at the time stay was sought [J.A. 56]. Both were at the same stage of development — early discovery. No other evidence was introduced on the stay motion.

The record clearly demonstrates (1) the state action is *in personam,* (2) the actions had progressed to the same stage (early discovery), (3) the federal forum is convenient (37 miles from the state court), (4) other than local prejudice the state proceedings are adequate, (5) the substantive claims involve well-settled questions of state law, and (6) the proceeding in the federal action neither creates nor avoids piecemeal litigation. The subcontractors could be added by Lake in the federal action by crossclaim or third-party complaint without losing jurisdiction.

The district court stayed, saying:

> ORDER—Filed July 15, 1983
>
> The defendant has moved the Court to dismiss or stay this action pending resolution of an action involving the same issues and the same parties, et al., in Letcher Circuit Court (Civil Action No. 82-CI-414). The Court has considered the parties' responses and replies to responses to defendant's motion herein and is of the opinion that no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems. The Court being so advised,
>
> IT IS HEREBY ORDERED, that in the interests of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piecemeal litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.

[J.A. 80].

At the time of stay, Lake had filed its counterclaim in the federal action [J.A. 41-53] and R&S had filed its counterclaim in the state court action [J.A. 27-31]. The issues were the same in both courts except (1) R&S asserted a lien in federal court, and (2) Lake joined the Kentucky subcontractors as defendants in state court. Neither action was interfering with or intruding upon the conduct of the other.

The diversity jurisdiction of the United States district court under 28 U.S.C. § 1332 is not questioned. Viewing the stay as tantamount to dismissal and perceiving error, R&S appealed. The United States Court

of Appeals for the Sixth Circuit reversed [J.A. 103-107]. Petition for rehearing was denied [J.A. 108]. This Court granted certiorari.

R&S takes a dim view of the procedural disadvantage wrought upon it by the stay and the delays inherent in the appellate process. R&S filed a motion for summary reversal in the circuit court of appeals [J.A. 81-89]. R&S also objected to a stay of the mandate by the court of appeals [J.A. 109, 110] and moved in this Court for issuance of the mandate.

This action was filed over two years ago. But for the stay it would have been tried in the district court. As it now stands, the state court case is set for trial in September 1985, and a final judgment there may be *res judicata*. If this occurs, R&S will have been deprived of the federal forum granted it by the Congress.

SUMMARY OF ARGUMENT

The basis of federal judicial power is article III of the United States Constitution. Section 2, clause 1 granted Congress the power to confer diversity jurisdiction. Diversity jurisdiction was conferred in 1789. It still exists today. 28 U.S.C. § 1332. The grant is mandatory, and no discretion to decline is given. This vests a right to a federal forum in citizens so situated.

The district court, with jurisdiction, had an unflagging obligation to proceed despite concurrent state proceedings. There is no basis for abstention. There were no exceptional circumstances. In diversity cases, the absence of a federal question and the application of state law does not provide exceptional circumstances.

No basis for discretion to decline jurisdiction is present, and no discretion to decline is permitted by 28 U.S.C. § 1332.

The heavy burden of establishing a basis to decline jurisdiction was on Lake. It failed to meet that burden. The court of appeals correctly evaluated the situation and properly reversed the district court.

ARGUMENT

1. The Basis of Federal Judicial Power.

Article III of the United States Constitution is the foundation of the judicial power of our federal system. Section 1 establishes the courts thusly:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, clause 1 gives the subjects of federal jurisprudence:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdictions; — to Contro-

> versies between two or more States; — between a State and Citizens of another State; — between citizens of different States, — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subject.

The power created by the Constitution is not self-executing in the inferior courts. The Constitution sets forth the ambit within which the Congress may act to mandate adjudication of controversies in the inferior federal courts. *See, e.g. Cary* v. *Curtis,* 44 U. S. (3 How.) 236, 245 (1845); *Sheldon* v. *Sill,* 49 U. S. (8 How.) 441, 448-49 (1850).

The breadth of the discretion of the Congress is unlimited in determining which causes the inferior courts shall hear within the ambit of article III powers. The Congress may grant, withhold or limit jurisdiction, partially or *in toto*. *See Cary,* 44 U. S. 236; *Sheldon,* 49 U. S. 441. The Congress may confer exclusive jurisdiction on the federal courts, preempting the state courts. 18 U.S.C. § 3231; 15 U.S.C. § 78 aa; 15 U.S.C. §§ 15, 26; *e.g. Freeman* v. *Bee Mach. Co.,* 319 U. S. 448 (1943). Or the Congress may expressly grant concurrent state and federal jurisdiction. 45 U.S.C. § 56; *e.g. Miles* v. *Illinois Central R.R.,* 315 U. S. 698 (1942).

The vast majority of congressional jurisdictional grants simply impose on the federal courts the duty to entertain justiciable controversies in article III areas without expression of exclusiveness. In the absence of intent to make federal jurisdiction exclusive, the pre-

sumption is that Congress did not intend those causes to be asserted only in the federal courts. *See, e.g. Plaquemine Tropical Fruit Co.* v. *Henderson,* 170 U. S. 511 (1898); *Gulf Offshore Co.* v. *Mobile Oil Co.,* 453 U. S. 473, 477-84 (1981). The framers of the Constitution, carrying forward the federalist concept, thus established jurisdiction concurrent with the state courts.

2. Concurrent Jurisdiction

Concurrent jurisdiction has long been a judicial fact of life in our dual court system. The right and duty of the state and federal courts to hear matters within their jurisdiction is not now open to question. *See, e.g. Suydam* v. *Broadnax,* 39 U. S. (14 Pet.) 67, 75 (1840); *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 360 (1910).

The law under which the claim arises is not determinative of the court in which it must be pursued.

Justiciable controversies arising under federal law may be asserted in the state courts. *Claflin* v. *Houseman,* 93 U. S. 130, 131 (1876). Indeed, state courts are under a duty to enforce claims based upon federal law. *See, e.g. Claflin,* 92 U. S. at 137; *Mondou* v. *New York, N.H. & H. R.R. Co.,* 223 U. S. 1, 55-59 (1912); *Testa* v. *Katt,* 330 U. S. 386, 391 (1947).

Conversely, the federal courts have the firm duty to decide actions based solely on state law. *See, e.g. Kline* v. *Burke Constru. Co.,* 260 U. S. 226, 234 (1922); *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 77-78 (1938); *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U. S. 336, 344 (1976).

3. Jurisdiction as an Individual Right.

Congressionally granted jurisdiction confers on the recipient citizen a personal enforceable right to a federal forum. *See, e.g. Turner* v. *Bank of North America,* 4 U. S. (4 Dall.) 8, 10 (1799); *Cary,* 44 U. S. at 245.

4. The Duty to Exercise Jurisdiction.

The courts of this nation, both state and federal, uniformly adhere to the principle that a grant of jurisdiction is a mandate to adjudicate all justiciable controversies within the jurisdictional ambit. *See* 20 Am. Jur. 2d *Courts* § 93 (1965); 21 C.J.S. *Courts* § 90 (1940).

The duty to exercise jurisdiction has been often acknowledged by this Court. *See, e.g. England* v. *Louisiana Medical Examiners,* 375 U. S. 411, 415 (1964); *Kline,* 260 U. S. at 234; *Burgess* v. *Seligman,* 107 U. S. 20, 34 (1883); *Knox County* v. *Aspinwall,* 65 U. S. (24 How.) 376, 384-85 (1861); *Bank of the United States* v. *Deveaux,* 9 U. S. (5 Cranch) 61, 87 (1809).

5. The Unflagging Obligation to Proceed.

The obligation to exercise jurisdiction is triggered by the commencement of a justiciable controversy within the jurisdiction of the federal court. Once commenced it is the duty of the court to move forward in the ordinary processes of the court with all deliberate speed until the controversy is finally adjudicated. *See, Kline,* 260 U. S. at 230.

Lake complains that proceeding here would be onerous and a duplication of judicial effort. But Mr. Justice VanDevanter observed in *Mondou:*

> The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication.

223 U. S. at 58.

Lake suggests R&S should be satisfied with a state forum. And the district court held R&S had shown "no good cause" to seek a federal forum. But R&S, facing a feud the equivalent of Hatfield - McCoy,[1] objected and appealed, relying on the words of Mr. Justice Brennan in *England:*

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that "[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied."

375 U. S. at 415 (quoting *Willcox* v. *Consolidated Gas Co.,* 212 U. S. 19, 40).

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[1]The Hatfield-McCoy feud took place in the county adjoining the state court situs. Jones, *The Hatfields & The McCoys,* The University of North Carolina Press, (1948).

The duty to proceed was firmly expressed by Mr. Justice Campbell in *Hyde* v. *Stone:*

> . . . the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.

61 U. S. (20 How.) 170, 175 (1858); *see also Thermtron,* 423 U. S. at 344.

But perhaps the most eloquent expression was by Chief Justice Marshall in *Cohens* v. *Virginia:*

> It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

19 U. S. (6 Wheat.) 264, 404 (1821).

The current authoritative pronouncement of the rule is found in *Colorado River Cons. Dist.* v. *U. S.* 424 U. S. 800 (1976). Mr. Justice Brennan, speaking for the Court, pointed out:

> Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction. . . ." *McClellan* v. *Carland,* [217 U. S., 268] 282, 54 L. Ed. 762, 30 St. Ct. 501 [1910]. *See Donovan* v. *City of Dallas,* 377 U. S. 408, 12 L. Ed. 2d 409, 84 St. Ct. 1579 (1964). As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. *See Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.,* [342 U. S. 180 (1952)]; *Steelman* v. *All Continent Corp.,* 301 U. S. 278, 81 L. Ed. 1085, 57 S. Ct. 705 (1937); *Landis* v. *North American Co.,* 299 U. S. 248, 254, 81 L. Ed. 153, 57 S. Ct. 163 (1936). This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. *England* v. *Medical Examiners,* 375 U. S. 411, 415, 11 L. Ed. 2d 440, 84 S. Ct. 461 (1964); *McClellan* v. *Carland, supra* at 281, 54 L. Ed. 762, 30 S. Ct. 501; *Cohens* v. *Virginia,* (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821) (dictum). Given this obligation, and the absence of weightier consider-

> ations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.

424 U. S. at 817-18.

This view has been quoted and decisively applied as late as 1983 in *Moses H. Cone Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 15 (1983).

6. Pullman Abstention.

We need only note that the unflagging obligation is limited, where appropriate, by the three instances of abstention enumerated in *Colorado River*. 424 U. S. at 814-16. None of the Pullman abstention elements are present here, and Lake does not assert otherwise.

7. Younger Abstention.

A fourth ground for abstention finds its source in *Younger* v. *Harris*, 401 U. S. 37 (1971). The thrust of the doctrine is that comity and the federalist structure of the judiciary will not tolerate federal judicial interference with state functions in which the state has vital concerns. The state concern in *Younger* was interference with the prosecution of a crime against the state.

Younger's progeny extended the doctrine to civil proceedings. *See, e.g. Huffman* v. *Pursue*, 420 U. S. 592 (1975); *Juidice* v. *Vail*, 430 U. S. 327 (1977); *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Moore* v. *Simms*, 442 U. S. 415 (1979).

Younger abstention has no relevancy here. Lake apparently agrees. Here there is no paramount state interest (state criminal prosecution, protecting abused children, protecting state judicial process, etc.), and there is no federal interference or intrusion sought or suggested. In *Colorado River*, this Court held *Younger* inapplicable:

> Finally, abstention is appropriate where . . . federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings. . . . Like the two previous categories, this category does not include this case. . . . We also do not deal with an attempt to restrain such actions . . .

424 U. S. at 816; *accord Traughber* v. *Beauchane*, Nos. 84-5366, 84-5703 (6th Cir., April 22, 1985).

In the instant case, we are not dealing with an attempt to restrain, interfere with, or intrude upon the state court action; nor is there a vital state interest involved. Absent intrusion into or interference with a vital state interest, actual or attempted, abstention to maintain federalism is inappropriate. Federalism can be best maintained here by securing to R&S its right to an effective federal forum.

8. Exceptional Circumstances.

This Court noted that wise judicial administration might justify not proceeding in "exceptional circum-

stances." *Colorado River,* 424 U. S. at 818. The factors enumerated by the Court to be considered include:

(a) *The Presence of a Res* — The state action is *in personam.* R&S asserts liens only in the federal action.

(b) *The Status of the Actions* — Both proceedings were at the same early discovery stage.

(c) *Inconvenience of the Federal Forum* — The state and federal courthouses are 37 miles apart. Both are served by U. S. Highway 119.

(d) *The Adequacy of the Courts* — Both courts and their proceedings are adequate with substantially similar rules.

(e) *The Law Involved* — Well-settled state law is to be applied under *Erie.*

(f) *Avoidance of Piecemeal Litigation* — All parties to the subject contract are present in both courts. Only the subcontractors are absent in the federal action, and the viability of Lake's claim against them is doubtful.[2] In any event, Lake can join the contractors by crossclaim or third party complaint without destroying diversity. Fed. R. Civ. P. 13(h), 14 and 20. No piecemeal litigation would result if properly practiced.

The court of appeals took to heart the letter and the spirit of the guidelines set forth in *Colorado River*

[2]J.A. 105-07.

and *Moses H. Cone Hospital.* Each factor potentially favoring stay was carefully weighed and found without substance.[3] The facts compel concurrence here.

Absent circumstances justifying abstention and the rare exceptional circumstances invoking wise judicial administration, the unflagging obligation to proceed should have prevailed. Instead, the district court surrendered jurisdiction in disorderly retreat.

9. Discretion.

Lake invokes trial court discretion to defeat jurisdiction. Discretion is indispensable in the orderly adjudicatory processes of the court. But Lake's reliance on discretion to discard jurisdiction is badly misguided.

The statute itself grants jurisdiction based on diversity of citizenship alone. 28 U.S.C. § 1332. It is not dependent upon judicial concurrence or discretionary approval. Neither does the statute permit discretionary divestiture of jurisdiction once invoked. In short, Congress did not authorize jurisdiction to be affected by the discretionary act of the court involved. *Colorado River* made this clear. 424 U. S. at 814.

The only discretion afforded the trial judge affecting jurisdiction is in determining whether exceptional circumstances exist, and even that is reviewable. The very narrow exceptional circumstances outlined in *Colorado River* provide the limits of that discretion, and it must be exercised within that standard. *Moses H. Cone Hospital,* 460 U. S. at 19.

[3]*Id.*

We suggest that discretion is never a basis to decline jurisdiction. We urge that once jurisdiction is invoked, absent abstention, the judicial ship must commence its unceasing journey to adjudication. No jurisdiction conferred by the Congress permits otherwise. The district judge, as captain of the ship, must stay at the helm and maintain complete control. In guiding the ship through procedural waters, the captain must be mindful of his unflagging obligation to adjudicate.

The discretion that does exist is procedural discretion. The Congress may mandate jurisdiction, but it is within the province of the judiciary to carry out the adjudicatory process. Such is the nature of the separation of powers.

This Court well knows that two actions traveling parallel but different paths will encounter varying situations. The federal judge and the state judge, acting in comity. will need to exercise discretion to properly guide and control their respective proceedings. This discretion may invoke temporary deferral, early implementation, and other discretionary procedural variations to accomodate docket conditions, emergency situations, and the constantly changing procedural circumstances. These procedural discretions come within the framework of the congressionally conferred jurisdiction as a normal part of the adjudicatory process. Expediting or delaying a cause for procedural reasons is not tantamount to declining jurisdiction.

To obey the congressional jurisdiction mandate is for the district court to assume control and to travel relentlessly toward adjudication. The key to compliance with the congressionally imposed duty is to maintain control of the proceedings at all time — a "hands on" approach. Procedural delays, acceleration, accommodations and other discretionary procedural diversions are not the equivalent of refusal to assume jurisdiction. It is only when, as here, the district judge relinquishes control and abandons jurisdiction that the congressional mandate is violated. The fine line between discretionary delay and scuttling of jurisdiction must be decided on a case-by-case basis.

The "discretionary" aspect of jurisdiction has led to much confusion and some patent error, as in this instance. The discretion as to jurisdiction is constitutionally vested in the Congress, and not the courts. To decline jurisdiction based upon discretion is to invade the area constitutionally reserved to the Congress. No court can or should so encroach.

We would remind the Court that Congress may delegate discretion to the executive to perform congressional mandates. Similarly there is no reason why the Congress could not give the judiciary the discretion to assume or reject jurisdiction under congressional guidelines. However, the Congress has not seen fit to do so. In the absence of a congressional grant, the judiciary has no such jurisdictional discretion.

10. Diversity Jurisdiction

Lake would have this Court decline diversity jurisdiction because it has become burdensome and outmoded — that it has outlived what was contemplated and provided for by our founding fathers.

Congress established diversity jurisdiction in 1789. Judiciary Act of 1789, Ch. 20, § 3, 1 Stat. 73. Diversity jurisdiction has been in force, if not in vogue, ever since, despite perpetual attacks upon it.[4] The robust survival of this senior jurisdictional citizen establishes the congressional esteem it enjoys and the vitality it retains.

Lake suggests that there is no federal question present and, thus, exceptional circumstances exist permitting surrender of jurisdiction. Lake confuses diversity jurisdiction with federal question jurisdiction. The two were conferred separately by the Congress, and each stands alone. Federal question jurisdiction, a relative newcomer, was conferred in 1875. Act of March 3, 1875, § 1, 18 Stat. 470; currently 28 U.S.C. § 1331. Either will suffice for jurisdictional purposes.

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[4] *E.g.*, H.R. 2404, 97th Cong., 1st Sess. (1981) (a bill to abolish diversity jurisdiction); S. 679, 96th Con., 1st Sess. (1979) (a bill to modify diversity jurisdiction); H.R. 180, 96th Cong., 1st Sess. (1979) (a bill to abolish diversity jurisdiction); H.R. 2202, 96th Cong., 1st Sess. (1979) (same); H.R. 9622, 95th Cong., 1st Sess. (1977) (same); and such earlier bills as *e.g.*, S. 939, 72d Cong., 1st Sess. (1932) (a bill to limit jurisdiction of the United States district courts); H.R. 11508, 72d Cong., 1st Sess. (1932) (same); S. 4357, 71st Cong., 2d Sess. (1930) (same); S. 3151, 70th Cong., 1st Sess. (1928) (same).

Lake implies, and the district court held, that R&S was required to show "good reason" why its claim could not be properly heard in the state court.

The duty to show prejudice was required in some of the earlier diversity *removal* statutes dating back to the Act of March 2, 1867. 14 Stat. 558. This was eliminated as unnecessary in the 1948 revision of the Judicial Code. 28 U.S.C. § 1441. *See* C. Wright, *Handbook of the Law of Federal Courts,* at 86 (1976).

The legislative history establishes the congressional intent that a showing of prejudice not be required in original diversity actions. 28 U.S.C. § 1332.

State law is universally applied in all diversity cases. That is what *Erie* is all about. The presence of federal law is a factor favoring retention of jurisdiction, but its absence does not favor surrender in a diversity case. To hold otherwise would repeal 28 U. S. § 1332. *See Moses H. Cone Hospital,* 460 U. S. at 25-26.

Confusion in this area has created havoc. Unwarranted reliance on the absence of a federal question and misplaced emphasis on state law expertise where none was required led to a diversity stay under appellate compulsion in *Microsoftware Computer Systems* v. *Ontel Corp.,* 886 F. 2d 531, 537-38 (7th Cir. 1982). *See also, Voktas* v. *Central Soya Co.,* 689 F. 2d 103 (7th Cir. 1982); *Evans Transp. Co.* v. *Scullin Steel Co.,* 693 F. 2d 715 (7th Cir. 1982).

Given the tendency of counsel to create "exceptional circumstances," we can expect more and more such

confrontations with more and more diverse answers. The Court should address this issue.

Jurisdiction, its requirements and its extent, are political issues. That diversity jurisdiction is within the perimeter of federal judicial powers is settled by the Constitution. United States Constitution, article III, section 2, clause 1. The implementing of diversity jurisdiction has been settled by the Congress. 28 U.S.C. § 1332. The Congress has determined the political issue of diversity jurisdiction without reservation. In the words of Chief Justice Marshall in *Cohens:* "[w]e find no exception to this grant, and we cannot insert one." 19 U. S. at 404.

We need not defend diversity jurisdiction. But if defense is needed, we look no further than Chief Justice Marshall speaking for the Court in *Deveaux:*

> However true the fact may be that the tribunals of the States will administer justice as impartially as those of the nation to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

9 U. S. at 87.

We need only add that the words of Chief Justice Marshall are updated by the current 28 U.S.C. § 1332.

11. The Domino Effect on Other Jurisdictional Grounds.

Lake would single out diversity jurisdiction for discretionary surrender of jurisdiction where a prior concurrent state action is present. We deny that diversity jurisdiction is a senior citizens whose demise is long overdue. Remembering Mark Twain, we suggest that its death has been greatly exaggerated. At least, this Court should not be ready to administer last rites.

In each jurisdictional grant, the Congress has spelled out the requisites and given the federal judiciary its marching orders. Not once in the non-exclusive jurisdictional statutes has the Congress established a jurisdictional pecking order. We must assume that the Congress intends all jurisdictional grants to have equal protection by this Court and equal exercise by all courts. Accordingly, we submit that diversity jurisdiction, unpopular though it be to Lake, is entitled to equal implementation by this Court.

A troublesome aspect arises in other jurisdictional areas. Civil rights actions are growing as a subject for concurrent jurisdiction. Steinglass, *The Emerging State Court § 1983 Action,* 38 U. Miami L. Rev. 382 (1984). The instant situation can and soon will arise in civil rights actions. In such a case, can courts surrender jurisdiction to the state court through discretion or otherwise, or does the civil rights claimant have a right to a federal forum? The same situation will most certainly arise in many other federal question situations. R.I.C.O. jurisdiction may pose the same

problem. 18 U.S.C. § 1964. We could run the gamut of undiscussed concurrent jurisdictional grants, with the same questions but no answers.

The answer given here must be fashioned to fit all concurrent jurisdictional grants, establishing uniform guidelines for the circuits to follow. That answer must be: absent abstention, exercise of jurisdiction is compulsory with discretion available only in procedural matters.

12. The Burden of Proof.

The prior action pending defense is historically an affirmative defense raised by plea in abatement. 1 Am. Jur. 2d *Abatement* §§ 38, 39 (1965); 1. C.J.S. *Abatement* §§ 81, 191 (1940); *Sheppard* v. *Graves,* 55 U. S. (14 How.) 505, 510-11 (1852). As such, the party asserting abatement has the burden of establishing it. Under modern practice the proper method of seeking stay or abatement is by answer or motion. Fed. R. Civ. P. 8(e), 12(b) and 56.

Aside from the affirmative defense burden, the concurrent jurisdiction established by the Congress and the unflagging obligation to proceed impose a strong burden on the party seeking to thwart the court in the performance of its duty. The district court erred in holding otherwise.[5]

Here jurisdiction admittedly exists. With jurisdiction present, the burden of establishing the "exceptional circumstances," the "clearest of justifications,"

[5]J.A. 105.

is heavy indeed. *Moses H. Cone Hospital,* 460 U. S. at 26.

The burden of establishing exceptional circumstances was on Lake. The court of appeals correctly held there was no basis to support surrender.

13. Misconstrued Authorities.

The confusion and diverse results in the inferior courts are understandable. Given the ingenuity of counsel, exceptional circumstances are often found where none exist. Exceptional circumstances usually exist in the eye of the beholder. The broader the discretion, the more the jurisdictional problems are compounded. Numerous decisions by the district and circuit courts add to the confusion. A definitive decision here can remedy that.

Lake (and some of the inferior courts) have misconstrued certain decisions of this Court. The mainstream of concurrent jurisdiction and the views expressed here are consistent with these decisions. We discuss them briefly.

Will v. *Calvert Fire Insurance Company* was a mandamus proceeding to compel District Judge Will to proceed with a Securities Exchange Act claim. 437 U. S. 655 (1978).

> The key to Calvert was the standard for issuance of a writ of mandamus under 28 U.S.C. § 1651. As Justice Rehnquist stressed, such extraordinary writs are used in aid of appellate jurisdiction only to confine an inferior court to a lawful exercise

> of its prescribed authority, or to compel it to exercise its authority when it is its duty to do so.

Moses H. Cone Hospital, 460 U. S. at 18.

Justice Rehnquist held Calvert had not met the burden of proof required for mandamus. "At the same time, he noted that the movant might have succeeded on a proper appeal." *Id.* Viewed in that context, the language from *Will* is not persuasive here. Indeed, this court in *Moses H. Cone Hospital* reversed the stay as improper.

Brillhart v. *Excess Insurance Company* was a Federal Declaratory Judgment action. 316 U. S. 491 (1942). This Court there held declaratory judgment is discretionary by Congressional enactment. 28 U.S.C. § 2201. The discretion conferred by the Congress extends not only to whether the forum is appropriate, but also to whether the action should be entertained at all. *Mechling Barge Lines* v. *United States,* 368 U. S. 424 (1961). Properly viewed, *Brillhart* has no application here.

We would emphasize, however, that 28 U.S.C. § 2201 and *Brillhart* form a perfect example of a congressional grant of discretion to decline to adjudicate even where jurisdiction is present. But here we have mandatory jurisdiction, a justiciable controversy and no congressionally granted discretion to surrender jurisdiction.

CONCLUSION

This federal action, timely and properly filed, has been effectively precluded by trial court error and delay in the appellate process. Lake, which induced and maintained the erroneous stay, now asserts the state action has progressed to the point that "wise judicial administration" converts the error into a stroke of judicial genius. Brief for Petitioner, p. 19.

Lake, quick to litigate, won the race to the courthouse. Through error invited by Lake and appellate delay, Lake is approaching the finish line in its race to judgment. Yet it cautions against "an unseemly and destructive race to see which forum can resolve the same issues first." Brief for Petitioner, p. 11.

We do not know how it can be done. But if R&S has been wrongfully deprived of a federal forum, it should be placed in the procedural posture it enjoyed as of the entry of the stay order. A wrong inflicted by judicial error should be rectified by judicial ingenuity.

The opinion of the court of appeals, totally sound, should be affirmed.

Respectfully submitted,

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